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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 723

INTERCITY TRANSPORTATION CO. INC.,
Petitioner,

—against—

HENRY A. BARNES, as Commissioner of Traffic of the City of New York,
Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Jurisdiction

Petitioner concedes (Reply Brief, pp. 1, 2) that it could have taken an appeal to the New York Court of Appeals as of right under New York Civil Practice Act, §588, sub 1(a) (superseded on September 1, 1963 by New York Civil Practice Law and Rules §5601(b)). Petitioner states that it chose instead to apply to the New York Court of Appeals for leave to appeal in order to make "available for reversal non-constitutional questions" which it asserts could not be considered on an appeal as of right.

This argument is without basis in fact.

The New York Court of Appeals has consistently ruled that where an appeal has been taken to that

Court as of right from the Appellate Division on constitutional grounds, nonconstitutional questions will also be considered. See for example, *Matter of Kohnberg v. Murdock* 5 N Y 2d 859, 860 (1958) where the Court stated "nonconstitutional questions may be argued, along with constitutional issues, when the appeal is taken as of right under paragraph (a) of subdivision 1 of section 588 of the Civil Practice Act." See also COHEN AND KARGER, Powers of the New York Court of Appeals (Rev. ed. 1952), page 257.

Petitioner's quotation from page 256 of this book (Brief, p. 2) is not in conflict with our contention on this issue and deals with a different problem.

Conclusion

The petition for certiorari should be denied.

January 31, 1964.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel of the
City of New York,
Attorney for Respondent.

SEYMOUR B. QUEL
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